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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ELECTRONIC FUNDS SOLUTIONS, LLC et al.,

Plaintiffs and Respondents,

v.

MICHAEL MURPHY et al.,

Defendants and Appellants.

G040161

(Super. Ct. No. 01CC02447)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed, as modified.

Akin Gump Strauss Hauer & Feld, Rex S. Heinke, Edward P. Lazarus, L. Rachel Helyar; Greenwald & Hoffman, Paul E. Greenwald, Paul A. Hoffman and John R. Flocken for Defendants and Appellants.

Johnson and Associates and Einar Wm. Johnson for Plaintiffs and Respondents.

* * *

Defendants Electronic Payment Technologies, LLC (EPT), Michael Murphy, and Ty Bishop suffered a default judgment of $24,040,272, entered in favor of plaintiffs Electronic Funds Solutions, LLC (EFS) and Michael Barry, after defendants erased information contained on computer hard drives the trial court had ordered produced in discovery. In a prior appeal, we determined the trial court erred because (1) the compensatory damage award improperly exceeded the $50,000 amount prayed for in plaintiffs' complaint, and (2) plaintiffs incorrectly based the measure of damages on the value of EPT as a company, instead of EFS's lost profits. We gave plaintiffs the option either to accept the default and proceed with a new prove up with damages limited to $50,000, or to amend their complaint to seek a larger damage award, which would open the default and allow defendants to file new answers.

On remand, plaintiffs amended their complaint and defendants answered. Plaintiffs then filed a new motion for sanctions to again strike their answers. The trial court granted the motion and took defendants' default. After prove up, the court entered judgment for plaintiffs in the total amount of $67,347,404.31, consisting of $10 million in tort compensatory damages, plus $7 million in prejudgment interest; $72,193.14 in damages for conversion, plus $50,535 in prejudgment interest; $20 million in exemplary damages for trade secret misappropriation; $30 million in general punitive damages; and $224,675.97 in attorney fees and costs.

Defendants now challenge the trial court's ruling striking their answers and taking their default. Defendants contend our previous ruling, Supreme Court precedent, and due process prevents the trial court from imposing terminating sanctions absent evidence they continued to disobey discovery orders. Defendants also contend plaintiffs employed the wrong measure in calculating compensatory damages, the compensatory damage award is unsupported by substantial evidence, the court erred in assessing prejudgment interest, and the punitive damage award failed to take into consideration their financial condition.

We conclude the trial court did not abuse its discretion in again issuing terminating sanctions. The trial court's previous discovery orders are still outstanding and the evidence demonstrates defendants have failed to fully comply. Moreover, defendants' inability to produce the information because they intentionally destroyed some of the responsive materials or transferred them to a third party is not an excuse for failing to obey the trial court's discovery order.

We also conclude plaintiffs' proof of compensatory damages, relying on EPT's net income, was appropriate given the similarity between EPT and EFS. We decline to review defendants' claim the compensatory damage award is unsupported by substantial evidence because defendants failed to set forth in their briefs all of the evidence plaintiffs submitted in support of those damages. We conclude the trial court did not err in assessing prejudgment interest under Civil Code section 3288 (all further statutory references are to this code unless otherwise noted) because the case was not tried to a jury. Finally, we conclude the punitive damage award must be stricken because plaintiffs failed to introduce evidence of defendants' net worth. Accordingly, we affirm the judgment as modified.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Original Complaint*

"[A]round March 2000, Barry, Murphy, and Bishop orally agreed to form EFS, a company designed to assist merchants in electronically recovering funds from customers' bank accounts when their checks are dishonored. The parties agreed Barry would be the company's chief executive officer and president. Murphy and Bishop were named vice-presidents with responsibility for running EFS's Orange County office and maintaining the company's books and records. Although EFS officers, Murphy and

Bishop had no management authority and could not make substantive decisions on behalf of EFS without Barry's knowledge and approval.

"The business had no ready clients at its inception, but the marketing efforts of all three principals soon attracted numerous clients. EFS also entered into licensing agreements with suppliers who provided processing services necessary to operate the business. By December 15, 2000, EFS had contracts with at least 51 merchant customers.

"In December 2000, Murphy and Bishop refused to sign a written operating agreement for EFS, declared they no longer wished to do business with Barry, and announced their withdrawal from the company. Instead of leaving EFS's Orange County office, however, Murphy and Bishop changed the locks and converted company assets, such as computers and software, to their use. They removed Barry's password access to EFS's website, appropriated EFS's incoming mail, and stopped forwarding EFS's telephone calls to Barry. Though they claimed to have left the company, Murphy and Bishop converted monies held for, and owed to, EFS and entered into contracts in EFS's name without Barry's knowledge or consent. Murphy and Bishop adopted a new company name, EPT, but misled EFS's customers into believing EPT was merely a new name for EFS.

"Plaintiffs' February 2001 complaint alleged the following: (1) breach of fiduciary duty; (2) conversion; (3) intentional interference with economic relations; (4) intentional interference with prospective economic relations; (5) negligent interference with economic relations; (6) negligent interference with prospective economic relations; (7) misappropriation of trade secrets; (8) unfair competition and untrue and misleading advertising; (9) trespass as to real and personal property; (10) accounting; (11) declaratory relief; and (12) money had and received. The complaint sought injunctive and declaratory relief, along with damages 'in an amount in excess of $50,000 and according to proof.' In response to defendants' subsequent

demand for a bill of particulars, plaintiffs provided damage calculations in excess of $1,840,000.

"B. *First Inspection Demand*

"Plaintiffs propounded several discovery requests, including specially prepared interrogatories and document inspection demands. The first set of inspection demands sought to examine the business records of EFS and EPT. After defendants objected, the parties settled the discovery dispute when defendants stipulated to produce all responsive documents not covered by the attorney-client and work product privileges. Defendants also agreed to 'liberally' construe the document request, 'resolving any alleged doubts in favor of production.' The defendants agreed to affirm in a supplemental statement they had not withheld any documents except those protected by the attorney-client and work product privileges. The stipulation expressly required the production of all electronic data, including e-mail messages. The trial court entered the stipulation as a court order.

"Defendants served the supplemental statement affirming they had produced all documents in their possession responsive to the first set of requests, with the exception of attorney-client/work product documents created while defending the litigation. The statement asserted, however, a computer virus destroyed responsive e-mails on Murphy's computer several months after plaintiffs served the document demand.

"Concluding the supplemental statement did not comply with the stipulated order, and that defendants continued to withhold responsive documents, plaintiffs sought terminating sanctions in a contempt proceeding. At the hearing, the court ordered defendants to serve within seven days a revised supplemental statement and to produce all responsive documents per the stipulated order. The court also imposed $1,000 in sanctions against each defendant.

"Defendants provided a revised supplemental statement and additional documents at Murphy's first deposition session, and produced more documents at the second session of Murphy's deposition, which occurred after the court's seven-day deadline for compliance. Defendants failed to produce any electronic data. During Murphy's deposition, plaintiffs discovered that documents requested in the first document demand had not been produced. Defendants later turned over more documents responsive to the first demand, but plaintiffs claimed defendants violated the stipulated order because other responsive documents had not been produced.

"C. *Second Inspection Demand*

"On April 10, plaintiffs moved for sanctions and to compel production on their second set of document inspection demands. These demands essentially sought to inspect EPT's computers, including the one that stored the e-mails destroyed by the computer virus. Although defendants lodged several objections to the demands, they failed to raise any objections in their opposition to plaintiffs' motion. Indeed, despite filing an 'opposition,' defendants represented they were not opposing the motion to compel, and agreed to turn over one computer they believed belonged to EFS (EFS Computer), and permit plaintiffs to copy the hard drives of EPT's four other computers (EPT Computers).

"The trial court granted plaintiffs' motion without qualification, ordered defendants to produce the items within 15 days, and imposed sanctions. The court's order included the following warning: 'DEFENDANTS ARE ALSO PUT ON NOTICE THAT FAILURE TO TIMELY COMPLY WITH SAID DISCOVERY ORDERS COULD RESULT IN THE ISSUANCE OF AN ORDER TO SHOW CAUSE RE CONTEMPT AND/OR THE IMPOSITION OF SANCTIONS, INCLUDING MORE SEVERE SANCTIONS, INCLUDING BUT NOT LIMITED TO THE STRIKING OF ANY DEFENDANT'S ANSWER OR CROSS-COMPLAINT, OR THE STRIKING OF

DEFENDANTS' ANSWERS AND ENTRY OF DEFAULT JUDGMENT AGAINST THEM.'

"Defendants gave the EFS Computer to plaintiffs in the courthouse parking lot immediately after the hearing, and produced the four EPT Computers at EPT's offices for hard drive imaging. Plaintiffs' computer forensic consultant, George Hiscox, examined the computers' hard drives to determine if any data had been removed or destroyed. In his report, Hiscox concluded the four EPT Computers had their hard drives 'wiped' by 'Data Eraser' software between the time the court ordered their production and Hiscox's inspection. The wiping program writes over each hard drive sector to ensure all traces of data formerly stored on the machine cannot be retrieved. Hiscox surmised that data had been copied from the hard drives, the drives wiped, and selected data reinstalled. One EPT Computer, however, had extractable data due to incorrect use of the wiping program. Hiscox, utilizing his expertise, recovered an Outlook calendar, contacts, e-mail, and attachments.

"The EFS Computer's hard drive had also been wiped by the Data Eraser software, but the program had been aborted before completion. The Data Eraser program was run on April 10, 2002, at approximately 2:35 p.m. Given the hearing on the motion to compel on April 10 began at 3:00 p.m., and defendants had promised to hand the computer over at the hearing, it appears the defendants aborted the Data Eraser program because defendants ran out of time to complete the wiping process. Although interrupted before it could complete its work, the Data Eraser program did destroy the hard drive's master boot record, partition table, file allocation table, and a number of other sectors. The destruction of these portions of the hard drive made the computer impossible to start up, and prevented the hard drive from being read even as a secondary drive to a running computer. The data recovered from this computer was obtained through forensic techniques.

"Despite the intentional destruction of data on the hard drives, defendants served supplemental responses asserting under oath they had fully complied with the demands, making no mention of any data removed from the computers.

"D. *Other Discovery Matters*

"In addition to the second inspection demands, the April 10 motions to compel included plaintiffs' third inspection demand, and first and second set of specially prepared interrogatories. Except as to plaintiffs' first set of specially prepared interrogatories to EPT,[1] the trial court granted all of the motions to compel, with monetary sanctions imposed against defendants for each. The court also stayed further discovery until plaintiffs informed the court that defendants had fully complied with the outstanding discovery orders. Despite the court's order staying discovery, defendants served a subpoena on Hiscox.

"Plaintiffs also propounded a supplemental inspection demand, seeking any newly acquired documents responsive to the first document inspection demand. Defendants never responded to this request, despite their attorney's agreement to do so.

"Plaintiffs also served a subpoena upon EFT Network, one of EPT's service providers. EFT Network had agreed to comply with the subpoena, but defendants' attorney, without seeking to quash the subpoena or request a protective order, contacted EFT Network and threatened to terminate all business with the company if it complied with the subpoena.

"E. *Motion for Terminating Sanctions*

"Based on defendants' alleged destruction of evidence, continued failure to comply with the court's discovery orders and other discovery abuses, plaintiffs filed an

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"[1] Plaintiffs' motions to compel responses to their first set of specially prepared interrogatories against EPT centered on allegations made in EPT's cross-complaint. The trial court denied the motions to compel responses to these interrogatories because EPT dismissed its cross-complaint before the hearing.

ex parte application to clarify the trial court's discovery stay order and to delay the trial 30 days. Plaintiffs explained they needed the additional time to complete their review of defendants' discovery responses and to file a motion for terminating sanctions. The trial court appointed a discovery referee and ordered the parties to submit all further discovery matters to him.

"The referee denied plaintiffs' ex parte application, in part because of plaintiffs' purported failure to file a supporting declaration. Although plaintiffs did not request permission to file a motion for terminating sanctions, the referee interpreted the ex parte application as doing so. Accordingly, the referee's recommendation included the following: '[T]he request for leave to file a motion for terminating sanctions is rendered moot by the introduction of defendant FEDCHEX into this action, and the resulting continuance of trial and relevant critical dates.' The trial court adopted the referee's recommendations.

"Plaintiffs later filed a motion for terminating sanctions before the referee. Around this time, plaintiffs also served upon defendants documents entitled 'Plaintiffs' Statement of Damages and Plaintiffs' Notice of Amount of Punitive Damages Sought.' In the statement of damages, plaintiffs claimed losses, excluding interest, of $8,040,272.19. In the notice of punitive damages, plaintiffs sought exemplary damages of $16 million.

"The referee recommended the trial court strike the motion as inconsistent with the court's previous order. But the trial court sustained plaintiffs' objection to the recommendation and set a hearing on whether to impose terminating sanctions. Plaintiffs argued at the hearing that defendants had not complied with any of the court's discovery orders regarding plaintiffs' inspection demands, and first and second sets of specially prepared interrogatories. Plaintiffs emphasized evidence that defendants tampered with the hard drives of the EPT and EFS Computers. In addition, plaintiffs relied on

defendants' violation of the discovery stay, interference with the subpoena served on EFT Network, and failure to respond to the supplemental inspection demand.

"The trial court granted the motion, and struck the cross-complaints of Murphy and Bishop, struck defendants' answer to the complaint, and ordered defendants' default entered. The court later denied defendants' motion under Code of Civil Procedure section 473 to overturn the order, claiming their attorneys were responsible for the discovery abuses. Plaintiffs then filed an application for a default judgment, with supporting evidence. [Fn. omitted.]

"Before the court could rule on the request for default judgment, Bishop filed for bankruptcy. Granting plaintiffs' motion to sever, the trial court entered judgment against Murphy and EPT. The trial court later entered judgment against Bishop when the bankruptcy court lifted the stay. The judgments assessed against defendants compensatory damages of $8,040,272.19, and punitive damages of $16 million, the amounts reflected in the statement of damages and notice of punitive damages, and provided plaintiffs with prejudgment interest and attorney fees." (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1167-1172 (*Electronic Funds*).)

F. *Defendants' First Appeal*

Defendants appealed the judgment, and we reversed and remanded. (*Electronic Funds, supra,* 134 Cal.App.4th 1161.) We determined Code of Civil Procedure section 580,[2] which limits compensatory damages to the amount demanded in the complaint, applied where the trial court struck the defendants' answer as a discovery sanction. Because the operative complaint sought damages "'in an amount in excess of

[2] Code of Civil Procedure section 580, subdivision (a), provides: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115 . . . ."

$50,000,'" we concluded the maximum amount of any compensatory damage award was limited to $50,000. (*Electronic Funds*, at p. 1174.)

We also vacated the compensatory damage award in its entirety because the court erroneously based its award on the market value of EPT, rather than the lost profits of EFS. (*Electronic Funds, supra,* 134 Cal.App.4th at pp. 1179-1181.) Because we vacated the compensatory damage award, we also vacated the punitive damage award. (*Id.* at p. 1185.) We concluded our opinion with the following instructions: "The trial court shall conduct a new damages prove up hearing to determine the amount of EFS's lost profits, if any, limited to a maximum of $50,000, and the amount of any punitive damages. Alternatively, plaintiffs may elect to amend their complaint to increase the amount of compensatory damages being sought, at which point defendants' default will be opened." (*Ibid.*)

G. *Second Motion to Strike*

After remittitur issued, plaintiffs opted to amend their complaint to increase their damage prayer to "an amount in excess of $10,000,000 and according to proof . . . ." Plaintiffs also served notice it would seek punitive damages in the amount of $50 million. Defendants answered the amended complaint. Approximately three months later, plaintiffs filed their "Motion for Terminating Sanctions Striking the Newly Filed Answers of Defendants Michael Murphy and Ty Bishop with Entry of Default as to the Complaint . . . ." The trial court granted the motion, ruling: "The DCA found that Defendant's actions in erasing computer hard drives prior to producing them pursuant to a discovery order to be an egregious violation of the court order, justifying terminating sanctions. This Court agrees. The terminating sanctions are the striking of responding party's answers, and entering default to be followed by judgment." During oral argument on the motion, the court explained: "I see nothing in the [appellate] opinion to prevent [this] court from imposing them again based on the prior actions or allowing defendants

to 'start from scratch.'" Later, the court granted plaintiffs' motion for terminating sanctions against EPT.

Plaintiffs filed a motion for default judgment, with supporting evidence. The trial court granted the motion, entering judgment in the total amount of $67,347,404.31, consisting of the following: $10 million in compensatory damages, plus $7 million in prejudgment interest; $72,193.14 in damages for conversion, plus $50,535.20 in prejudgment interest; $20 million in exemplary damages for trade secret misappropriation; $30 million in general punitive damages; and $224,675.97 in attorney fees and costs. Defendants now appeal the latest judgment.

II

DISCUSSION

A. *The Trial Court Did Not Abuse its Discretion in Striking Defendants' Answers and Entering a Default*

Defendants contend the trial court violated the law of the case by disregarding our instructions in the prior appeal when it again struck defendants' answers and entered a default against them. We disagree.

Nothing in our previous opinion prevented the trial court from taking the action it did. In the opinion, we determined "plaintiffs should have the option of either proceeding with a new default prove-up with the $50,000 damage limitation, or amending the complaint to state the full amount of damages they seek. [Citation.] If plaintiffs select the latter option, the default will be vacated, entitling defendants to either attack the pleadings, or answer the amended complaint." (*Electronic Funds, supra*, 134 Cal.App.4th at p. 1177.) When plaintiffs elected to amend their complaint, defendants were provided the opportunity to answer. Accordingly, the trial court's subsequent action in striking the answer did not on its face violate the law of the case.

Nor did the trial court's course of action violate the Supreme Court's ruling in *Greenup v. Rodman* (1986) 42 Cal.3d 822 (*Greenup*). There, the trial court struck the defendant's answer as a discovery sanction after he repeatedly failed to appear for deposition, failed to answer questions at a deposition when he did appear, and, in response to a discovery request, produced documents in a box containing horse excrement. After the parties had reviewed the documents produced, the defendant announced to the parties they should wash their hands because he had treated the documents with a toxic compound readily absorbed through the skin. (*Id.* at p. 825.) Following a default prove up, the court entered judgment against the defendant for $676,000, consisting of $338,000 in compensatory damages and $338,000 in punitive damages. (*Id.* at p. 826.) Because the complaint requested damages "'in an amount that exceeds the jurisdictional requirements of this court,'" however, the Supreme Court ordered the compensatory damages in the judgment reduced to $15,000, the jurisdictional minimum of the superior court. (*Id.* at p. 830.) The court also reduced the punitive damage award to $100,000, the amount requested in the complaint. (*Ibid.*) Recognizing its ruling deprived the plaintiff of full compensation for her loss, the court ruled "she should be allowed to choose to forego the reduced award prescribed herein and instead to file an amended complaint praying for a different amount of damages and/or other appropriate relief. If she so elects, she must serve her amended complaint on defendants, who will be entitled to file a new answer; *all issues will then be at large, including liability. Of course, if defendants thereafter continue to disobey discovery orders and incur a second default judgment as a sanction*, plaintiff will have the right, at a second ex parte hearing, to prove her actual damages up to the limits of her amended prayer." (*Ibid.*, italics added.)[3]

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[3] In *Julius Schifaugh IV Consulting Services, Inc. v. Avaris Capital, Inc*. (2008) 164 Cal.App.4th 1393, 1398, a panel of this court noted that once a plaintiff files an amended answer, a previously defaulted defendant "can answer the amended

Defendants argue the trial court ran afoul of *Greenup* because they did not continue to disobey discovery orders. But defendants still have not complied with existing discovery orders. Specifically, plaintiffs' second inspection demand essentially sought to allow plaintiffs to inspect EPT's computers. Defendants did not raise any objections to production in their opposition to plaintiffs' motion to compel, and they agreed to turn over the computers. Most importantly, the court ordered the production of the computer drives without objection. Defendants removed data on the computers' hard drives with Data Eraser software before production. In their opposition to plaintiffs' most recent sanctions motion, defendants assert they did not destroy any evidence, but merely redacted information they believed was privileged, confidential, or beyond the scope of the court's orders. In particular, defendants removed data pertaining to FedChex, another check processing company that had used some of the EFS computers in its business. In his declaration, Bishop asserts defendants made copies of the information on the hard drives before running the Data Eraser program. He believed defendants turned over most of the FedChex data to FedChex and plaintiffs could subpoena the information. He also notes that since the FedChex "data is now dated, Defendants do not have a strong concern about the propriety value of such material and Defendants are willing, for the sake of getting beyond Plaintiffs' contentions, to produce any documents and data it has regarding FedChex . . . ."

Even if we accepted defendants' assertions that no data was destroyed — an assertion rejected by the trial court — Bishop's declaration demonstrates that defendants still have not turned over what responsive materials remain in defendants' possession. The trial court's order to produce the computer drives without objection is still in effect. Remittitur following defendants' first appeal was issued on February 17, 2006, and the hearing on plaintiffs' second sanctions motion was held on June 4, 2007.

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complaint, and can have his day in court." (*Id.* at p. 1397.) Nothing in the opinion, however, guarantees a trial to a defendant who continues to disobey discovery orders.

Defendants had plenty of time to comply with the trial court's outstanding discovery order before the court struck their answers for the second time. Defendants' assertion they are *willing* to turn over documents rings hollow in light of their past broken promises to produce. The outstanding discovery order required defendants to turn over the documents within a specified number of days, not to simply promise to produce them at some future date.

Bishop also asserts in his declaration "that most or all of the FedChex data previously contained in the computers sought by Plaintiffs from Defendants was transferred to FedChex's control and custody, and can now be obtained from FedChex." Defendants offered to allow plaintiffs to subpoena the materials from FedChex without objection. But turning over materials subject to a discovery order to a third party and then telling the other side to subpoena the documents is not an acceptable method of compliance.

We see no violation of defendants' due process rights in the present situation. When plaintiffs amended their complaint and opened the default, defendants had the opportunity to comply with the outstanding discovery orders. Given defendants' assertion the computer drives were copied before they were wiped clean, defendants could have provided the copies to plaintiffs for review and analysis. To the extent they already had turned the materials over to a third party, they could have taken steps to secure their return and production. In other words, plaintiffs' amendment of their complaint gave defendants one last clear chance to comply. But defendants chose to do nothing. Thus, substantial evidence supports a finding defendants have continued to disobey outstanding court orders.

Even if defendants' preamendment actions prevented them from later complying with existing discovery orders, we would still affirm the trial court's ruling. A continuing discovery violation does not end if the responding party is permanently unable to comply because that party intentionally destroyed the materials it was ordered

to produce. To simply wipe the slate clean would allow defendants to benefit from their intentional destruction of evidence, an outcome not mandated by the *Greenup* decision. In our prior opinion, we rejected any suggestion defendants might not have erased data had they known their liability could reach $24 million: "There is a significant difference between choosing not to defend a lawsuit at all, and defending a lawsuit by willfully disobeying lawful discovery orders. Defendants willing to accept known liability may properly elect to watch from the sidelines. But if a defendant chooses to participate, he or she must play by the rules. . . . We cannot endorse a litigant's conscious decision to deliberately destroy evidence — based on the perception damages are limited to a particular amount." (*Electronic Funds, supra,* 134 Cal.App.4th at p. 1178.) Accordingly, we conclude the trial court did not abuse its discretion in striking defendants' answers to plaintiffs' amended complaint and entering a default.

B. *Plaintiffs Used Appropriate Methodology in Proving Damages*

In our previous opinion, we determined the trial court erred in awarding plaintiffs compensatory damages of $8,040,272.19 because it was based on the market value of EPT as a company, and not EFS's lost profits. We provided the following guidance: "Damage awards in injury to business cases are based on net profits. [Citation.] '"'Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." [Citation.]'" [Citations.]' [Citation.]'" '"'Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. [Citation.] It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. [Citations.]" Moreover, . . . a plaintiff is "not

required to establish the amount of its damages with absolute precision . . . . [Citation.]" [Citations.]' [Citation.]" (*Electronic Funds, supra,* 134 Cal.App.4th at p. 1180.)

Although vacating the compensatory damage award, we rejected defendants' contention that any lost profit damages would be speculative because EFS was a start-up company. On this subject, we observed: "The party seeking to recover lost profits from an unestablished business must demonstrate with reasonable certainty the basis for the claim. This generally requires expert testimony concerning '"economic and financial data, market surveys, and analyses, business records of similar enterprises"' or 'general business conditions and the degree of success of similar enterprises.' [Citation.]" (*Electronic Funds, supra,* 134 Cal.App.4th at p. 1181.) Recognizing plaintiffs' contention that defendants "essentially stole EFS's business methods, customers, contacts, licenses, office, and equipment and used it to form EPT," we concluded that "EPT's business experience is . . . unquestionably relevant and may, depending on the proof submitted, provide a basis for determining EFS's lost profits." (*Ibid.*) Finally, we made the following observation regarding the particular facts of the present case: "We recognize that demonstrating lost profits is not always an easy task. This is certainly true here, where defendants deliberately thwarted legitimate discovery. The special circumstances of a particular case may allow the court more latitude in estimating damages, particularly where the difficulty in estimation arises from the defendant's bad faith. [Citation.] A wrongdoer cannot complain if his or her conduct '"creates a situation in which the court must estimate rather than compute [damages]. [Citations.]" [Citation.]' [Citation.]" (*Ibid.*)

In calculating compensatory damages on the second default prove up, plaintiffs started with the $25 per check dishonor fee charged to the customer, discounted by the $0.80 cut the vendor takes from the transaction. The plaintiffs multiplied the $24.20 net fee by 100,000, which represented the number of transactions EPT processed per month according to EPT's corporate profile, and multiplied by an 80 percent recovery

rate, which yielded the sum of $1,936,000 per month in gross revenues. Plaintiffs calculated an alternate monthly revenue figure showing a recovery rate of 53 percent, determined from certain reports obtained from EPT through subpoena, which yielded gross revenues of $1,282,600. These figures were then reduced by 50 percent, representing the highest level of commission available to the sales representatives, which yielded net revenues of $968,000 and $641,300 per month, respectively.

From these revenues were subtracted office rent of $2,250 per month for the EFS's Orange County office, and $1,000 per month for the firm's Palos Verdes office. Plaintiffs also deducted the pay of 35 employees at a rate of $15 per hour, multiplied by 160 hours per month, for a total salary expense of $84,000 per month. Plaintiffs estimated office expenses, for utilities, supplies, telephone, and maintenance, amounted to $40,000 per month. Deducting rent, salary, and office expenses from the two net revenue figures, which yielded the sum of $840,750 and $514,040 in net income, respectively. Plaintiffs then averaged these two figures to come up with a monthly income of $677,400 per month, or $8,128,800 per year. Plaintiffs then multiplied this annual figure by five years, yielding a total damage number of $40,644,000. Because plaintiffs' amended complaint requested damages of $10 million, the trial court reduced the compensatory damage figure to that amount.

We conclude the methodology used to calculate compensatory damages appropriately determined net profits. Defendants challenge the compensatory damage award because it calculates the net profits of EPT, not EFS. But as we noted in our previous opinion, plaintiffs may use EPT's business experience as a basis for estimating EFS's lost profits. EPT, like EFS, was a start up company. According to plaintiffs' complaint and proof, EPT essentially stole EFS's business methods, office, computer system, and customers to begin its business. Given these facts, EPT's net profits provide an appropriate surrogate for estimating EFS's lost profits. Moreover, plaintiffs' profit

analysis looked solely to that portion of EPT's business stolen from EFS, the recovery of dishonored checks.

In addition to challenging plaintiffs' methodology and use of EPT as a surrogate in calculating EFS's lost profits, defendants contend the damage award is not supported by sufficient evidence. "'"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." [Citations.]' [Citation.] . . . And we presume that the record contains evidence to sustain every finding of fact. [Citation] It is the appellant's burden to demonstrate that it does not." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658, original italics.)

To meet this burden, the appellant must fairly summarize all of the material evidence admitted at trial, not merely the evidence favorable to his or her position. (*Boeken, supra,* 127 Cal.App.4th at 1658; *Kanner v. Globe Bottling Co*. (1969) 273 Cal.App.2d 559, 564.) We are not required to scour the record to ascertain whether it sustains the appellant's contentions. (*Eistrat v. J. C. Wattenbarger & Sons* (1960) 181 Cal. App. 2d 57, 63.) Consequently, failure to set forth all material evidence amounts to waiver of the alleged error and we may presume the record contains evidence to sustain every finding of fact. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.)

Here, defendants fail to set forth all of the evidence plaintiffs relied upon in obtaining their default judgment. Although taking particular aim at plaintiffs' expert report, defendants disregard all of the other evidence supporting plaintiffs' damages. Accordingly, we deem defendants' challenge to the sufficiency of the evidence waived. Finding no error in the methodology plaintiffs used to calculate compensatory damages, we do not disturb that portion of the judgment.

C. *The Trial Court Did Not Abuse Its Discretion in Awarding Prejudgment Interest*

Section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." Although section 3288 expressly grants authority to award prejudgment interest only to the jury, the trial court, when acting as the trier of fact, may also award prejudgment interest under the statute. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801.) Here, the trial court, which awarded prejudgment interest on plaintiffs' noncontract claims, acted as the sole trier of fact in ruling on plaintiffs' default prove up.

Defendants, however, contend the trial court lacked the power to award discretionary prejudgment interest under section 3288 because plaintiffs did not specifically request relief under that provision. In support, they rely on two cases, *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 962 (*Wisper*), and *Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565 (*Stein*). Neither case supports defendants' contention.

In *Wisper,* the trial court correctly decided the issue of interest under section 3288 because the amount of damage could not be determined until after trial; therefore, the interest determination was never submitted to the jury. (*Wisper, supra*, 49 Cal.App.4th at p. 962.) Because section 3288 requires the jury, not the judge, to determine prejudgment interest where the jury sits as the trier of fact, allowing the jury to complete its deliberations without considering the matter is fatal to an award of interest under this section. In *Stein,* the court determined that a stipulation to allow the court to award prejudgment interest, without citing a specific statutory provision, did not allow the trial court to determine prejudgment interest under section 3288 without submitting the matter to the jury. The court determined the defendant had a statutory right to have the jury determine the issue, and the defendant did not waive that right with its nonspecific stipulation. (*Stein*, *supra*, 7 Cal.App.4th at p. 572.)

Unlike *Wisper* and *Stein*, the present situation did not involve a jury. Because a judge may exercise its discretion to award prejudgment interest under section 3288 where the court sits as the trier of fact, the plaintiffs' failure to specifically cite to that provision did not deprive defendants of their right to have the matter heard by a jury. We therefore do not disturb the prejudgment interest award.

D. *The Punitive Damage Award Must Be Stricken*

"'The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.' [Citation.] The function of punitive damages is not served if the defendant is wealthy enough to pay the award without feeling economic pain. [Citation.] Nevertheless, the award must not be so great that it exceeds the level necessary to punish and deter. [Citation.]" (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581 (*Zaxis*).)

The highest courts of both the United States and California have established guideposts to assist a reviewing court in determining whether a punitive damage award is excessive. The United States Supreme Court prescribes consideration of the following in determining whether an award violates the due process clause of the United States Constitution: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]" (*State Farm Mut. Auto. Ins. v. Campbell* (2003) 538 U.S. 408, 418.) In considering a federal due process challenge, the reviewing court conducts a de novo review. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

Separate from Fourteenth Amendment considerations, the California Supreme Court has established three benchmarks for determining whether a punitive damage claim is excessive: "(1) the reprehensibility of the defendant's conduct; (2) the

actual harm suffered; and (3) the wealth of the defendant. [Citation.]" (*Zaxis, supra,* 89 Cal.App.4th at pp. 581-582; citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 (*Neal*).) Under the California standard, "An award that is reasonable in light of the first two factors may nevertheless be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone." (*Zaxis,* at p. 582.)

Plaintiffs contend proof of a defendant's financial condition is no longer required to support punitive damages, citing *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1184-1185 (*Simon*), for this proposition. *Simon,* however, does not aid plaintiffs.

In *Simon,* the California Supreme Court explained how a defendant's financial condition affects the analysis regarding the reasonableness of a punitive damage award under the due process clause of the Fourteenth Amendment. After considering United States Supreme Court guidance on the ratio between compensatory and punitive damages, the *Simon* court raised the concern that a constitutionally acceptable ratio between punitive and compensatory damages may render the punitive damage award so low that it would not have the deterrent effect contemplated under California's punitive damage law.

Expressing the purpose of punitive damages, the *Simon* court observed: "Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages 'for the sake of example and by way of punishing the defendant.' [Citation.] As we explained [citations], *the defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment*." (*Simon, supra,* 35 Cal.4th at pp. 1184-1185, italics added.)

Here, plaintiffs failed to present any evidence of the individual defendants' financial condition or net worth. The only evidence of EPT's financial condition is found in the expert report plaintiffs submitted, which estimated EPT's company value was

$15,021,317. Assuming the accuracy of this figure and that the two individual defendants were equal owners of the company, they would have had assets of approximately $7.5 million each. Plaintiffs presented no evidence demonstrating the individual defendants' liabilities. Thus, assuming no liabilities, the $50 million punitive damage award represents over six times the value of their individual assets. This is clearly excessive.

The purpose of punitive damages "is to deter, not to destroy." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 112.) Accordingly, when a defendant's financial ability to pay is measured in terms of net worth, punitive damage awards in excess of 10 percent of a defendant's net worth are generally considered excessive. (*Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515; see also *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596 [28 percent of net worth held excessive]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 994 [35 percent of net worth held excessive]; *Little v. Stuyvesant Life Ins. Co*. (1977) 67 Cal.App.3d 451, 469-470 [15 percent of net worth held excessive]; *Merlo* v. *Standard Life & Acc. Ins. Co*. (1976) 59 Cal.App.3d 5, 118 [30 percent of net worth held "so greatly disproportionate . . . that [award was] presumptively based upon passion or prejudice"].)

Of course, net worth may be subject to manipulation, requiring the court to consider other financial indicators of a defendant's ability to pay. (See *Zaxis, supra*, 89 Cal.App.4th at pp. 582-583 [$300,000 punitive damage award upheld despite large negative net worth where defendant had annual gross revenues in excess of $100 million and cash on hand of $19 million].) Here, plaintiffs point to the income calculations for EPT used in supporting their compensatory damages claim, in which they determined EPT earned $8,128,800 per year in net income. Viewed in this light, the $50 million punitive damage award represented approximately six times EPT's annual income. Such an award would be ruinous to any company, not to mention its owners. Accordingly, we conclude the punitive damage award must be stricken from the judgment.

III

DISPOSITION

The trial court is instructed to modify the judgment by striking the punitive damage award of $50 million. In all other respects, the judgment is affirmed. In the interests of justice, each side is to bear their own costs of this appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.